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IN THE

Supreme Court of the United States

October Term, 1945

In the Matter

of

DORA WINTER,

Alleged Bankrupt.

THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK, as Trustee, under an Indenture of Trust dated December 8th, 1932,

Petitioning Creditor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents this petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit.

Statement of Matter Involved

Petitioning creditor, acting as trustee under a trust agreement obtained a judgment against the alleged bankrupt on February 3, 1944, in excess of two million dollars

(fols. 25-26, 34) and filed a creditor's petition in bankruptcy against the alleged bankrupt in the District Court for the Southern District of New York on November 27, 1944 (fol. 33).

The alleged bankrupt is the widow of Benjamin Winter who was a resident of New York when he died on June 16, 1944. On June 15, 1944, the alleged bankrupt waived her right of election to take any part of her husband's estate in contravention of the terms of his will, dated May 8, 1944, whereby he left his entire estate to their son (fol. 69).

An application for the appointment of a receiver was made on November 28th, 1944, and granted.

The alleged bankrupt by order to show cause dated December 2, 1944, moved to have the involuntary petition dismissed for insufficiency and the order appointing the receiver set aside. By countermotion, the petitioning creditor, sought leave to amend paragraph "5" (fols. 26-27) of the involuntary petition in bankruptcy by substituting therefore the following proposed amendment (fols. 36-41):

"(AMENDED PARAGRAPH NUMBER '5')

That upon information and belief, the said Dora Winter, alleged bankrupt, within four months next preceding the filing of this petition, committed an act of bankruptcy, in that she did the following acts:

A. That the said alleged bankrupt, Dora Winter, conveyed and transferred a large part of her property on or about June 13th or 14th, 1944, with intent to hinder, delay or defraud her creditors, in that on or about the date aforementioned, June 13th or 14th, 1944, said Dora Winter made and executed a waiver of her right of election or power to take against the will of her late husband, Benjamin Win-

ter, which will was dated May 8th, 1944 and which left all the property of the said Benjamin Winter to his son, Marvin S. Winter, leaving nothing to said Dora Winter.

That the said waiver, conveyance or transfer of the said Dora Winter was made without any consideration or a fair consideration and was and is fraudulent as to her creditors and rendered her thereby insolvent. That the said waiver, transfer or conveyance of the said Dora Winter was not recorded and that information respecting same was obtained from the said Dora Winter in an examination in supplementary proceedings had by the attorneys for the petitioning creditor herein on or about September 28th, 1944. That the said waiver, conveyance and transfer of the said Dora Winter did not become so far perfected on or about the date of execution or at any time thereafter to date, that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee or assignee therein.

B. That the said alleged bankrupt concealed, removed or permitted to be concealed or removed her property on or about June 13th or 14th, 1944 with intent to hinder, delay or defraud her creditors, in that the said Dora Winter made and executed a waiver of her right of election or power to take against the will of her late husband Benjamin Winter, which will was dated May 8th, 1944 and further, in that she testified in supplementary proceedings on or about September 28th, 1944 that she executed a waiver in writing about two or three days before the death of Benjamin Winter, her husband, occurring on June 16th, 1944; that she did not have a copy of said waiver and had no knowledge whether said

waiver was recorded when, as a matter of fact, it was not recorded; that she received no money in consideration for the signing of said waiver, and did not know who has the waiver. That knowledge of the said concealment or removal or permission on the part of the said Dora Winter for such concealment or removal of her property was first had by petitioner through its attorneys on or about September 28th, 1944." (fols. 37-41)

The motion to amend was denied, the order appointing the receiver was set aside and the petition was dismissed by order dated April 28th, 1945.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 4th, 1946. By order of this Court dated May 3rd, 1946 the time for filing a petition for certiorari was extended to June 3rd, 1946. Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Questions Presented

1. Whether the proposed amendment to the petition in bankruptcy was legally sufficient.

2. Whether the waiver by the alleged bankrupt of her right of election to take against the will of her husband constituted an act of bankruptcy.

3. Whether the filing of the petition in bankruptcy was timely.

Reasons Relied on for the Allowance of the Writ

Petitioner respectfully submits that the case calls for the exercise of this Court's power of supervision in that the dismissal of the involuntary petition in bankruptcy with the proposed amendment has deprived petitioner of an opportunity of presenting the question of the alleged bankrupt's fraud for adjudication.

Petitioner respectfully prays that a writ of certiorari be allowed.

Dated: New York, N. Y., May 31, 1946.

THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK, as Trustee, under an Indenture of Trust dated December 8th, 1932.

By GETTINGER & GETTINGER,
Counsel for Petitioner.

PAUL P. GETTINGER,
SAMUEL W. SHERMAN,
LOUIS B. FINE,
Of Counsel.

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DORA WINTER,

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THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK, as Trustee, under an Indenture of Trust dated December 8th, 1932,

Petitioning Creditor.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court, is set forth in the transcript of record between pages 23 and 24 of said record (fols. 67-72).

The opinion of the Circuit Court of Appeals is attached to the record hereof as pages 31 through 37 and certified by the Clerk of the Circuit Court to this Court.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 4th, 1946. By order of this Court dated May 3rd, 1946 the time for filing a petition for certiorari

was extended to June 3rd, 1946. Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Statement

A summary statement of the matter involved is set out in the petition and in the interests of brevity is not repeated here.

Summary of Argument

Petitioner contends that the alleged bankrupt while insolvent committed an act of bankruptcy by executing the waiver of her right of election to take against the will of her husband for which she received no consideration.

The waiver is a conveyance and transfer within the meaning of the Bankruptcy Act (*under the Chandler Act as amended*) and is deemed fraudulent as to creditors without regard to the actual intent where executed during insolvency.

The right of election passes to and becomes vested in a trustee of bankruptcy and the waiver, fraudulently executed, cannot serve to preclude the trustee, *under the amendment of the Bankruptcy Act* (*Chandler Act*).

ARGUMENT

I

The Court erred in ruling that the waiver by the alleged bankrupt of her right of election to take against the will of her husband was binding upon a trustee in bankruptcy to be appointed.

Petitioner's position is to the effect that the alleged bankrupt while insolvent committed an act of bankruptcy by executing the waiver of her right of election to take against the will of her husband for which she received no consideration; and that when such waiver is set aside in an action to be brought by a trustee in bankruptcy to be appointed, that title to such right of election or power will pass to such trustee. The law with respect to petitioner's contentions is discussed under the subsequent Points.

The learned Court in its decision in effect held that the alleged bankrupt in waiving did what she was given the right to do by statute (fol. 69); that the statute (Sec. 18 of the Decedent Estate Law of the State of New York) was not enacted to interfere with the right of a husband or wife to dispose of property during the lifetime of both, nor was the statute enacted to interfere with a spouse's right to dispose of property by will free of claims of the surviving spouse, if such disposition has been consented to by the survivor (fol. 70).

It is contended that although a spouse would ordinarily have a right to waive the right of election to take against a particular will, yet where such waiver or conveyance is executed for no consideration or fair consideration during insolvency or by reason of which the spouse is rendered

insolvent, that such waiver is deemed fraudulent as to creditors without regard to the actual intent.

Secs. 67d (2) (a), 70e (1) (2) of the Bankruptcy Act;
Secs. 272, 273 of the Debtor and Creditor Law of the State of New York.

It is submitted that since the Bankruptcy Act which vests title to powers or right of election in a trustee in bankruptcy [70a (3)] supercedes state law, in the event of conflict, that the Court's statement as to a spouse's right to waive as fixed by statute, is subject to the exception herein noted. The right of waiver is not absolute but is subject to the Bankruptcy Act and the State Fraudulent Conveyances Act.

The right of the alleged bankrupt's husband to dispose of his property by will is not involved herein. The Court's remarks with respect thereto are not pertinent.

Of course, a parent may by his will leave nothing to his son, and a trustee in bankruptcy, for example, of such son would have no right to question such disposition of property. This holds true by reason of the fact that the son does not possess a right of election, granted by statute only to a spouse.

In the case at bar, if respondent's husband had by will left his entire estate in trust and had provided that one-third the income thereof be paid to respondent for life, a trustee in bankruptcy to be appointed would be unable to question such disposition except as to the possible sum of $2,500 by reason of the fact that respondent's right of election or power would not exist under the statute.

Decedent Estate Law, §18, subd. 1 (b);
In re Mayers' Estate, 184 Misc. 413.

The Court's statement that the wife would be at the mercy of her creditors if the rule were otherwise than as propounded by the Court (fol. 71) does not, therefore, apply or follow.

In such case where the wife's intestate share is left in trust by the husband's will, a trustee in bankruptcy of the wife's estate could only reach the income beyond the sum necessary for the education and support of the wife. The citation (*In re Bergman*, 6 F. Supp. 898) and the reference to Sec. 98 of the Real Property Law by the Court (fol. 72) would only be applicable to a state of facts above set forth but is inapplicable to the factual situation of the case at bar.

Section 98 of the Real Property Law is applicable only to a case where the trust itself that is set up by will is not questioned, or in other words, where the disposition made by will is not the subject of attack. In the case at bar, however, the disposition by will is questioned and is involved in controversy.

Even a trust conveyance may be set aside by a creditor or trustee where made without consideration.

> *Chase National Bank of the City of New York* v. *U. S. Trust Co. of New York*, 236 App. Div. 500 aff'd 262 N. Y. 557.

The Court in its decision likewise holds that the execution of the waiver without consideration does not constitute evidence of fraud (fol. 71). This ruling is contrary to statute law, Secs. 67d (2) (a), 70e (1) (2) of the Bankruptcy Act and Secs. 272, 273 of the Debtor and Creditor Law of the State of New York.

It is therefore respectfully submitted that the learned Court erred in its decision.

II

The waiver by the alleged bankrupt of her right of election to take her intestate share against the will of her late husband is a conveyance and transfer within the meaning of the Bankruptcy Act, and constituted an act of bankruptcy.

The waiver by Dora Winter, the alleged bankrupt, of her right of election to take against the will of her late husband (fols. 37-38) constituted a conveyance and transfer within the meaning of Section 1 (30) (defining "transfer") and also within the meaning of Section 3, discussing conveyances and transfers as Acts of Bankruptcy.

A case in point wherein the Court held a waiver signed by a spouse, which was not acknowledged but which bore the names of two witnesses, to be a conveyance and binding upon the spouse who signed the waiver, is *In re Maul's Estate* (decided 1941), 176 Misc. 170, affirmed 262 App. Div. 941, affirmed by the Court of Appeals in 287 N. Y. 694.

The Surrogate in said case (affirmed by the Appellate Division and the Court of Appeals), stated as follows at page 173 of 176 Misc., in referring to the waiver and holding same to be a conveyance:

> "The petitioner contends that the instrument in question is not a conveyance and therefore, the sections of the Real Property Law relative to the acknowledgment of conveyances do not apply. This court does not agree with this contention. Subdivision 3 of Section 290 of the Real Property Law states: '3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, * * *.'

A spouse by virtue of the right of election has an interest in the personal and real property of the deceased that can be defeated during his or her lifetime under circumstances set forth in Subdivisions 3, 4 and 5, Section 18 of the Decedent Estate Law.

When a spouse signs and duly acknowledges a waiver of right of election, he or she releases an interest in real property vested by virtue of the marital relation and the statute applicable. In other words, the spouse divests himself or herself of an interest in real property with the same force and effect as the giving of a quitclaim deed in a situation where such an instrument is necessary to convey."

At page 173 the Surrogate made the following further significant remarks:

"Before the amendment to the Decedent Estate Law became effective September 1, 1930, the inchoate right of dower in all the real property of the husband was the recognized right of the wife, and in order to convey good title the wife had to join in the conveyance of the husband; otherwise she still retained an interest in the property. Not only was it necessary that she sign the deed but for the purpose of recording it was obligatory that she acknowledge her signature or that the witness to her signature, who name was written in the instrument, acknowledge.

The words of the Commission to Investigate Defects in the Law of Estates in its original report, pages 83 to 87, are highly significant, particularly the following (p. 87): 'In line with the progressive policy of modern legislation and in place of dower, the Commission recommends that there be substituted the right of a widow to take her intestate share against the provisions of the Will.' Equally

significant is the Commission's note under Section 18 of the Decedent Estate Law, 'The section as proposed gives an increased right to the surviving wife or husband in lieu of the existing rights of dower and courtesy.'

It has been and still is the law that conveyances may be legally executed if properly attested by subscribing witnesses and that when proven and certified as to execution in the manner provided in the recording acts are entitled to record. This applied to and still applies to instruments releasing dower and it should apply and this court holds it does apply to waivers of the right of election."

The Appellate Division in said case, in its opinion, cited Section 274 of the Real Property Law for its ruling in addition to other sections—Section 274 of the said Real Property Law referring to "every conveyance, assignment, or other transfer of, and every mortgage or other charge upon the interest, or any part thereof, of any person in the estate of a decedent," etc.

Section 1 (30) of the Bankruptcy Act defines "transfer" as follows:

> " 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise."

The Act of 1938 broadened the old definition contained in former clause (25) of the Act of 1898 as it stood prior to the Act of 1938. 1 Collier on Bankruptcy, pages 93, 94.

1 Collier on Bankruptcy, at page 94, states as follows:

> "The word 'transfer' has always had a most comprehensive meaning under the Bankruptcy Act. It includes every method of disposing of or parting with property or its possession; * * *."

At page 96, Collier on Bankruptcy, states as follows:

> "The phrase 'conveyance' sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise' as used in this definition is obviously illustrative merely, and even without the use of the words 'or otherwise' does not qualify the meaning of the term so as to exclude a transfer by any other method.

In the case of *Matter of Muir* (D. C. Pa.,) 212 Fed. 495, 31 Am. B. R. 528, the Court in discussing "transfer" under the old definition which was not as broad as the present definition of transfer, stated as follows (at p. 501):

> "Section 1 (25) of the Bankruptcy Act defines the word 'transfer' to 'include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally.' Said the Supreme Court of the United States in *Pirie, etc.*, v. *Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bank. Rep. 814:
>
> > 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and nar-

> rowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished."

It is therefore apparent that the waiver herein constituted a conveyance or transfer within the meaning of the Bankruptcy Act and as defined by the term "transfer", which includes "and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein", etc. "or otherwise".

III

Under the Bankruptcy Act, the right of election which the alleged bankrupt had to take against the will of her late husband passes to and becomes vested in a trustee in bankruptcy.

Since the time of the enactment of the Bankruptcy Act in 1898 to date, powers which the bankrupt has, pass to the trustee in bankruptcy. Section 70a (3) of the Act remained unchanged except by the amendment of 1938 the word "solely" was added. 4 Collier on Bankruptcy, page 937.

Under Section 70a (3) a trustee in bankruptcy acquires title to all the bankrupt's "powers which he (the bankrupt) might have exercised for his own benefit, but not those which he might have exercised solely for some other person".

A power may be defined to be "the right, ability or faculty of doing something". Bouvier's Law Dictionary.

A power may be granted in an agreement, will, a written document, or by statute. For example, a power granted by a settlor of a trust agreement to some one to perform an act, or a power may be granted by statute, as in the instant case, the right of the widow to take against the estate of the husband. Decedent's Estate Law of New York, Section 18, Subdivision 7; also the statutory powers granted to an executor or trustee, and to an administrator. Sections 13 and 123, Decedent Estate Law.

While true that under the decisions of the state courts in New York, such power or right of election is deemed personal and does not pass to any one (who in those cases were not trustees in bankruptcy), yet, under the Bankruptcy Act, such power passes and vests in the trustee in bankruptcy. The Bankruptcy Act supercedes any state decisions which do not pertain to the title of a trustee in bankruptcy.

In the bankruptcy proceeding herein, since the power or right of election has been exercised by the alleged bankrupt, the trustee in bankruptcy when appointed will first have to bring an action to set aside the transfer or conveyance made by the bankrupt by the release or waiver of her right of election as being fraudulent under Sections 67d (2) and 70e (1) (2) of the Bankruptcy Act; and when said transfer or waiver of her right is set aside as being a fraudulent conveyance, then and in that event the power which the alleged bankrupt then has will automatically become vested in the trustee by reason of the provisions of the Bankruptcy Act, Section 70a (3).

Prior to the Bankruptcy Act of 1898, there was no provision in the Act vesting powers of the bankrupt in the trustee in bankruptcy. In 1879, the Supreme Court of

the United States in the case of *Jones* v. *Clifton*, 101 U. S. 225, held that the power of revocation which a bankrupt retained in a deed of conveyance and in an assignment, did not pass to the assignee in bankruptcy of his estate in the absence of a showing of fraud. At that time, that decision was correct, because the Bankruptcy Law as it existed then (in 1879) did not have any provision with respect to the vesting of powers in an assignee in bankruptcy, as is contained in the law today, since 1898.

In 1933, the Supreme Court of the United States, by Mr. Justice Cardozo, in the case of *Burnet* v. *Guggenheim*, 288 U. S. 280, 289, explained the meaning of the decision in *Jones* v. *Clifton* (*supra*) as follows:

> "*Jones* v. *Clifton*, 101 U. S. 225, holds that a power of revocation in a deed of conveyance from a husband to his wife does not avail without more to invalidate the transfer as one in fraud of creditors."

However, we may go further and state that if the *Jones* v. *Clifton* case had been decided today, such power reserved by the bankrupt husband in the conveyance to his wife would pass to the trustee in bankruptcy by reason of the Act (Section 70a [3]).

An examination of the briefs submitted in the United States Supreme Court in the case of *Burnet* v. *Guggenheim* (*supra*) by the respondent (the losing party in the Supreme Court of the United States) indicates that the respondent raised the contention that under the *Jones* v. *Clifton* case, the power of revocation and appointment reserved in the husband, is not a property right and that its extinction is not a transfer of property (brief for re-

spondent, pp. 5, 8, 12 and brief on petition for review, pp. 12 and 13).

This contention of respondent was rejected by the Supreme Court of the United States and the rule in the *Jones* v. *Clifton* case was explained. It may be of interest at this point to discuss the *Jones* v. *Clifton* case (*supra*) which is no longer the law today by reason of the Bankruptcy Act, Section 70a (3). Said case held that a conveyance of real property and an assignment of policies of insurance by a husband to his wife reserving to himself power of revocation and appointment, did not pass to the assignee in bankruptcy of the husband's estate, because no fraud was shown. At page 230, the Court stated as follows:

> "There was clearly no fraudulent intent on his part; no proof of such intent was produced or stated to be in existence. The only fraud asserted in argument to exist is constructive fraud arising from the reservation in question."

The Court, in the *Jones* v. *Clifton* case (*supra*) further goes on to state as follows:

> "The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee."

For that reason, the assignee in bankruptcy was not successful in his suit to set aside the deeds and compel a transfer.

Under Section 70a (3) of the Bankruptcy Act, therefore, since the right of election or power may be exercised for the benefit of the bankrupt and is not to be exercised "solely" for some other person, the trustee becomes vested with said power or right of election when the transfer is set aside.

The trustee upon his appointment and qualification will take title to all property transferred by the bankrupt in fraud of her creditors as well as all powers. Section 70a (3) (4) (5) (7) of the Bankruptcy Act.

IV

The question of fraudulent intent on the part of the alleged bankrupt in the within bankruptcy proceeding arises solely by reason of the fact that the alleged bankrupt has already exercised a power or right of election and waived her right to take as against the estate.

If the alleged bankrupt in this case had not exercised her power or right of election and had not waived same, then and in that event the trustee would become vested immediately with such power or right of election without any action whatever by reason of the Bankruptcy Act [Section 70a (3)].

However, in this case, the alleged bankrupt has conveyed or transferred certain property by exercising her power or right of election and waiving all her propety rights. Therefore, the trustee in bankruptcy to be appointed, must first set aside such conveyance, at which

time the trustee will have to prove that the transfer was fraudulent and will thereupon become vested with said power or right of election.

In this case, at the time of trial of the action to be brought for the purpose of setting aside the fraudulent conveyance, the trustee will prove that the bankrupt conveyed and transferred a large part of her property on or about June 13th or June 14th, 1944 with intent to hinder, delay or defraud her creditors by executing her waiver of her right of election (fols. 37-38); that she executed this waiver about two or three days before her husband's death, without any consideration whatever except she expressed her belief in her son's promise to support her for the rest of her life (fols. 38, 55). The trustee will also prove that the said Dora Winter was insolvent at the time she executed the said waiver (fols. 38, 56).

In *Schaefer* v. *Fischer,* 137 Misc. 420, the Court held a written instrument of so-called release by a debtor of all her interest in her father's estate to be a conveyance within the meaning of Section 270 of the Debtor and Creditor Law. The *Schaefer* case (*supra*) was cited in the case of *Sullivan* v. *B. S. Canner, Inc.,* 33 F. S. 500, 503.

Under Section 67d (2) of the Bankruptcy Act the waiver or transfer made by the alleged bankrupt is fraudulent "(a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent". Article 10 of the Debtor and Creditor Law of New York is of like import.

In the case at bar, there were existing creditors at the time of the transfer which was made without consideration by the debtor who either was insolvent or was thereby

rendered insolvent. Under such circumstances the question as to whether there was intent to defraud is immaterial for it is deemed fraudulent without regard to the debtor's actual intent. Section 67d (2) (a) of the Bankruptcy Act.

If Benjamin Winter the deceased husband of the alleged bankrupt, had died intestate, there can be no question that the trustee in bankruptcy would acquire title to the intestate share of the alleged bankrupt in the estate. The statute, Section 18 of the Decedent Estate Law, grants the alleged bankrupt the power to take her intestate share as against the will and such power and all the property of the alleged bankrupt will pass to the trustee, after the fraudulent transfer or conveyance is set aside.

V

The transfer or waiver made by the alleged bankrupt in consideration of her son's promise to support her for the rest of her life was made without consideration or a fair consideration, and is deemed fraudulent irrespective of the actual intent of the alleged bankrupt.

Under Sections 272 and 273 of the Debtor and Creditor Law of the State of New York, and similarly under Sections 67d (2) and 70e (1) (2) of the Bankruptcy Act, containing similar provisions, the transfer or waiver made by the alleged bankrupt in consideration of her son's promise for her future support, is not a fair consideration and is no consideration at all, and is deemed fraudulent as to creditors without regard to her actual intent.

Elmore Milling Co. v. *Carkees,* 255 App. Div. 410, motion denied, 256 App. Div. 871;
Sandler v. *Parlapiano,* 236 App. Div. 70.

It has been alleged in appellant's affidavit for leave to amend and in opposition to respondent's motion, that the said waiver, conveyance or transfer was made without any consideration or a fair consideration and was and is fraudulent as to her creditors and rendered her thereby insolvent (fol. 38). Also, in Exhibit A annexed to the said affidavit it is set forth that her testimony indicated no consideration for the signing of said waiver, except that she expressed her belief in her son's promise to support her for the rest of her life (fol. 55).

In the case of *Sandler* v. *Parlapiano*, 236 App. Div. 70, the Court stated as follows:

> "It was asserted that the sole consideration for the transfer of the property was that the wife and children would support him for the rest of his life. He has no other property, so that the transfer rendered him insolvent. A transfer made to near relatives without real consideration may be considered as likely to be in fraud of creditors."

Section 272 of the Debtor and Creditor Law reads as follows:

> "Sec. 272. *Fair consideration.*
>
> Fair consideration is given for property, or obligation.
>
> a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

Section 273 of the Debtor and Creditor Law reads as follows:

> "Sec. 273. *Conveyances by insolvent.*
>
> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Section 67d (2) of the Bankruptcy Act is in similar language.

4 Collier on Bankruptcy, par. 70.72 (pp. 1357, *et seq.*) states as follows:

> "Par. 70.72. Transfers to spouse, children or near relatives.
>
> One type of transfer frequently under attack by bankruptcy trustees is the bankrupt's voluntary transfer of his or her property or a portion thereof to the bankrupt's spouse, children or near relative. Transactions between husband and wife, children or near relatives, to the prejudice of the transferor's creditors, will be closely scrutinized by the courts to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the transferor's property beyond the reach of creditors. * * *
>
> In many states the rule is that where one who has debts outstanding makes a voluntary transfer to his or her spouse, children or near relatives, such transfer is at least presumptively fraudulent. * * *." (citing numerous cases both in this jurisdiction and in other jurisdictions).

At page 281 of 4 Collier on Bankruptcy, par. 67.33, it is stated as follows:

> "And, it has been held under the Uniform Act that promises to support the transferor and even to discharge his obligations do not constitute fair equivalents." [Citing authorities in other States as well as the case of *Sandler* v. *Parlapiano*, 236 App. Div. 70 (*supra*).]

For an action by a trustee in bankruptcy to set aside an alleged fraudulent conveyance from a bankrupt to his wife, see *Cohen* v. *Benjamin*, 246 App. Div. 866.

Of course, the Debtor and Creditor Law, which statute was passed on April 1st, 1925, made no change in the pre-existing law to the effect that if a debtor (subsequent bankrupt) is at the time insolvent, and advances a consideration for a conveyance to another, a constructive trust would result in favor of his creditors at that time or in favor of the trustee in bankruptcy. In this connection note *Banister* v. *Solomon*, 126 Fed. 2d 740 (2nd Cir.).

VI

The trustee herein to be appointed acquires title to the power or property of the bankrupt whether such power or property be deemed vested or contingent.

The trustee's title is not affected by the fact that the power or right of election which the wife, the alleged bankrupt, had on or about June 13th or 14th, 1944 was contingent, in the sense that said power or right was contingent upon her out-living her husband.

(a) A Contingent Interest is Transferable and Alienable

It is well established rule of law in this state that a contingent interest or property right is transferable and alienable and that it passes to a trustee in bankruptcy.

Clowe v. *Seavey,* 208 N. Y. 496;
In re Brand's Trust, 156 Misc. 312;
Moore v. *Littel,* 41 N. Y. 66;
In re Mirsky, 39 F. S. 773.

The same rule applies to personal property.

Stringer v. *Young,* 191 N. Y. 157;
In re Weaver's Estate, 253 App. Div. 24, aff'd 278 N. Y. 605.

(b) A Contingent Interest or Property Right is Attachable or Leviable

Section 916 of the Civil Practice Act as amended by the Laws of 1940, provides in effect that an attachment may also be levied upon a contingent interest or future estate as defined in subdivision 5 of Section 916 of the Civil Practice Act reading as follows:

"Section 916.

The attachment may also be levied upon:

5. A right or interest, present or future, to or in any of the property or estate of a deceased person, which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provision of a last will and testament admitted to probate at the time the attachment is granted, or by operation of law in case of the intestacy of the deceased."

Since, as noted under (a) above, a future interest which may be vested or contingent, is transferable, alienable or assignable, therefore, by statutory enactment (Section 916, subdivision 5 of the Civil Practice Act) it likewise becomes leviable or attachable.

Even though said contingent interest or property right were only transferable and not leviable, yet as will be noted herein, under the Bankruptcy Act Section 70a (5), the trustee would acquire title to such contingent property or interest by reason of the fact that said clause reads in the disjunctive to-wit: "transferred or which might have been levied upon".

(c) Statutory Enactments

Section 70a of the Bankruptcy Act provides that the trustee of the estate of a bankrupt upon his appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy, to all (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered; etc.; (7) contingent remainders, executory devices and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give

rise to powers in the bankrupt to acquire assignable interests or estates.

It will be noted as already referred to that clause (5) reads in the disjunctive "transferred or which might have been levied upon" and therefore the contingent interest herein would pass to the trustee by statute.

4 Collier on Bankruptcy, page 1010 with respect to the above, states as follows:

> "Section 70a (5) is sufficiently broad to include, under the law of many jurisdictions, property that has been fraudulently transferred by the bankrupt. * * * But since Section 70a (4) specifically vests the trustee with title to 'property transferred by him (the bankrupt) in fraud of his creditors,' section 70a (5) is in reference to this matter generally repetitive of the specific."

It therefore follows that the trustee in bankruptcy acquires title to property transferred by the bankrupt in fraud of her creditors and also acquires title to property which the bankrupt, prior to the filing of the petition, could by any means have transferred or which might have been levied upon, as in the case at bar.

4 Collier on Bankruptcy, page 1188 discusses clause (7) of Section 70a of the Bankruptcy Act as follows:

> "Clause (7) of Section 70a really provides an exception to a general rule established by virtue of Section 70a (5). That rule is: any contingent interest in property which the bankrupt may have will pass to the trustee *if* such interest was at the date of bankruptcy capable of assignment or subject to execution and sale or other seizure or sequestration according to the applicable state law. Clause (7)

was added to by Section 70a by the 1938 Act in order to relieve some inequities to creditors that were the result of the rule just stated, * * *."

Therefore, under clause (7) if we were even to consider the bankrupt's contingent interest to be nonassignable prior to bankruptcy (although it is assignable as indicated under the preceding subdivisions of this Point), and if within six months thereafter it became an assignable interest or gave rise to a power in the bankrupt to acquire an assignable interest, it would pass to the trustee.

For example, assuming *arguendo* that the contingent interest of the bankrupt was nonassignable, and assuming further that the alleged bankrupt's husband did not die prior to the bankruptcy proceedings but within six months thereafter, said interest or power would pass to the trustee. Whereas, formerly, prior to 1938, there was no six month limitation of time, it is now the rule that the only limitation is the six month period of time.

4 Collier on Bankruptcy, page 1190, lists the State of New York among those States which have changed the common-law rule by statute and have made contingent interests alienable.

The text follows at page 1191: "Under such statutes, of course, the holder of a contingent interest has a sufficiently vested estate that will pass to his trustee in bankruptcy". *In re Brand's Trust,* 156 Misc. 312, 34 Am. B. R. (N. S.) 806, 3 Simes, The Law of Future Interests (1936) Section 713.

By statute law of New York State, a contingent interest may be alienated, devised or it may descend under intestacy laws. See Section 59 of the Real Property Law dealing with expectant estates. Section 36 of the Real

Property Law divides expectant estates into future estates and reversions. Section 40 of the Real Property Law defines a future estate to be either vested or contingent. Section 35 of the Real Property Law divides estates as respects the time of their enjoyment into estates in possession and estates in expectancy.

VII

The trustee's title is unaffected by the fact that the power is designated as personal.

In the case of *In re Grant,* 21 F. (2d) 88, 90, the Court said:

> "The fact that this privilege or power is deemed personal to the insured is stressed somewhat by counsel for the bankrupt as bearing upon his claim that the right does not pass to the trustee. But this is not thought sound, in view of the provisions of subdivision 3 of section 70a of the Bankruptcy Law."

The very words used in Section 70a (3) indicate that it makes no difference whether the power is personal so long as it is not one which might be exercised "solely for some other person."

VIII

The filing of the petition or amended petition requested is timely.

Insofar as paragraph 5A of the proposed amended petition (fols. 37-39) is concerned, it is timely since it is brought under the first Act of Bankruptcy (Section 3a [1]).

1 Collier on Bankruptcy, par. 3.702, states as follows:

> "As noted in the preceding discussion, as to the first, second and fourth acts of bankruptcy, the four-month period does not expire until four months after the transfer has become so far perfected as to be indefeasible by bona fide purchasers or creditors.
>
> Generally under state law, creditors of the transferor are privileged to attack a fraudulent transfer, even though recorded, until the local statute of limitations has run. Until then such a transfer is defeasible by creditors. Section 3b thus lends itself easily to the interpretation that until that time a fraudulent conveyance may be utilized by creditors as an act of bankruptcy."

The provisions of the Bankruptcy Act as contained in Section 3b would be surplusage if this were not the meaning and intent. Section 3b of the Bankruptcy Act in part provides as follows:

> "A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the first, second, or fourth act of bankruptcy shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein."

Insofar as paragraph 5B (fols. 40-41) of the proposed amended petition is concerned, which deals with concealment or removal or permission to conceal or remove (like-

wise the first act of bankruptcy) the four month limitation begins to run only from the time of discovery, which in this case was on or about September 28th, 1944 (fol. 40).

Please note *In re Verona Const. Co.*, 126 F. 2d 976, citing Collier on Bankruptcy, Volume I, par. 3.702.

The learned Court below held that appellant does not state any facts indicating concealment (fol. 69). In this connection please note 1 Collier on Bankruptcy, page 416, wherein it is stated as follows as to acts of bankruptcy in concealment:

> "Where the act of bankruptcy consists of a concealment of the bankrupt's property, the precise details of the act of concealment may not, from the nature of the act, be capable of allegation; the manner and details of the concealment are matters of evidence and not of averment."

It would seem from the decision that the Court's denial of appellant's motion to amend is not based directly upon the question whether the petition is timely or not, although the Court refers to the question in its decision (fols. 68-70).

However, it is respectfully submitted that the petition was filed timely and that the amendment should have been allowed as proper.

It is respectfully submitted that the petition should be granted.

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LOUIS B. FINE,
Of Counsel.

FILE COPY

FILED
JUL 18 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 135

In the Matter

of

DORA WINTER,

Alleged Bankrupt.

THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK, as Trustee, under an Indenture of Trust dated December 8th, 1932,

Petitioning Creditor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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CASE CITED:

OTHER AUTHORITIES CITED:

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1292.

In the Matter

of

DORA WINTER,

Alleged Bankrupt.

THE CONTINENTAL BANK & TRUST COMPANY OF NEW YORK, as Trustee, under an Indenture of Trust dated December 8th, 1932,

Petitioning Creditor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner, The Continental Bank & Trust Company of New York, as trustee under an indenture of trust, filed an involuntary petition in bankruptcy against Dora Winter, in the United States District Court for the Southern District of New York.

Upon the application of said Dora Winter, the involuntary petition was dismissed, and the petitioning creditor's cross-motion to amend the involuntary petition was denied. The memorandum decision of Hon-

orable William Bondy, United States District Judge, upon said applications, appears at pages 23 and 24 of the record.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by Swan, Chase and Clark, Circuit Judges, affirmed the order of the District Judge (R. 31-37). The opinion of the Circuit Court of Appeals is reported in 153 F. (2d) 397.

The Respondent Opposes the Petitioner's Application for a Writ of Certiorari on the Following Grounds:

(1) The petitioner sets forth no special and important reasons for the granting of a writ of certiorari.

(2) The Circuit Court of Appeals in no way exceeded its powers, and committed no error, in affirming the order of the District Court, which dismissed the involuntary petition in bankruptcy and refused permission to amend. Even assuming that the act of the alleged bankrupt constituted an act of bankruptcy, the involuntary petition was filed too late.

Facts.

On November 27, 1944, an involuntary petition in bankruptcy was filed, in the United States District Court for the Southern District of New York, against Dora Winter, the respondent herein, by The Continental Bank & Trust Company of New York, as trustee under an indenture of trust (R. 5, 8-10).

Upon the *ex parte* application of said petitioning creditor, an order was signed on November 28th, 1944, appointing a receiver of the property of the alleged bankrupt (R. 5, 6).

The sole acts of bankruptcy alleged in the involuntary petition, were contained in paragraph 5 thereof, which reads as follows:

> "5. That upon information and belief, the said Dora Winter alleged bankrupt, within four months next preceding the filing of this petition committed an act of bankruptcy in that she did the following acts:
>
> (a) That the said alleged bankrupt conveyed and transferred a large part of her property in 1944, with intent to hinder, delay or defraud her creditors.
>
> (b) That the said alleged bankrupt concealed, removed or permitted to be concealed or removed her property in 1944 with intent to hinder, delay or defraud her creditors.
>
> (c) Upon information and belief, that the alleged bankrupt while insolvent, transferred portions of her property to one or more of her creditors with intent to prefer such creditors over her other creditors" (R. 9).

An application was made promptly by the alleged bankrupt in the District Court, for an order dismissing the involuntary petition and vacating the order appointing the receiver (R. 3-4), upon the ground that the petition was fatally defective (R. 4-7).

The petitioning creditor made no attempt, on said motion, to sustain the legal sufficiency of the involuntary petition (R. 11-16). On the return date of the application to dismiss, the petitioning creditor applied to the District Court, by way of cross-motion, for leave to amend paragraph 5 of the involuntary petition (R. 11-16).

The proposed amendment is set forth at length in the petition for a writ of certiorari (pp. 2-4), and in the record (R. 12-14), and need not be repeated here.

Both the District Court (R. 23-24), and the Circuit Court of Appeals (R. 31-37), held that:

(1) The allegations in the original petition were insufficient;

(2) The proposed amendment would not cure the defects by adequately alleging an act of bankruptcy committed within four months of the filing of the petition.

The involuntary petition was therefore dismissed, and leave to amend denied.

These are the rulings petitioner seeks to bring to this Court by means of a writ of certiorari.

POINT I.

Petitioner fails to set forth special and important reasons for the granting of a writ of certiorari.

In its petition, requesting that a writ of certiorari be granted, the petitioner seeks the intervention of this Court on the following ground:

> "* * * that the case calls for the exercise of this Court's power of supervision in that the dismissal of the involuntary petition in bankruptcy with the proposed amendment has deprived petitioner of an opportunity of presenting the question of the alleged bankrupt's fraud for adjudication" (p. 5, Petition for writ of certiorari).

The questions presented by petitioner to this Court (p. 4, Petition for writ of certiorari) are identical with those presented in the courts below.

Obviously, petitioner is merely seeking another hearing, in a higher appellate court, of the matters litigated, and considered, at length in the courts below.

Neither in its petition for a writ of certiorari, nor in its brief, does petitioner make reference to, or attempt to comply with, that portion of Rule 38 of the Rules of this Court, wherein this Court sets forth, for the guidance of petitioners, the special and important reasons for the granting of a writ of certiorari.

Examination of the relevant portions of Rule 38, will indicate that petitioner has not relied on any of the grounds set forth therein.

The Circuit Court of Appeals is not charged with having rendered a decision in conflict with the decision of another Circuit Court of Appeals, or in conflict with the decisions of this Court, or in conflict with the decisions of local courts on questions of local law.

No claim is made that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Nor is the Circuit Court of Appeals claimed to have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

It is submitted that a writ of certiorari should not be granted, in this case.

As was stated by Mr. Chief Justice Taft, in *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159 (1923):

> "The jurisdiction (to bring up cases by certiorari) was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing" (262 U. S. at 163).

POINT II.

The Circuit Court of Appeals in no way exceeded its powers, and committed no error, in affirming the order of the District Court.

Even assuming that the act of the alleged bankrupt constituted an act of bankruptcy, the involuntary petition was filed too late.

The insufficiency of the allegations of the original involuntary petition was not contested by petitioner either in the District Court or in the Circuit Court of Appeals. In its present application for a writ of certiorari, petitioner, neither in its brief nor in its petition, contends that the Circuit Court of Appeals erred in holding the original involuntary petition insufficient.

The proposed amendment to the involuntary petition was the point of contention.

As was stated by the Circuit Court of Appeals:

> "* * * the presently controverted issue is whether the proposed amendment would have cured the defects * * *" (R. 33).

The courts below were not presented merely with a request for permission to amend, but actually had before them the very amendment the petitioning creditor sought to make.

If the proposed amendment was also legally insufficient, it could not cure the original involuntary petition, and leave to amend had to be denied. Under these circumstances as the Circuit Court of Appeals stated:

> "* * * the refusal to allow the proposed amendment was not an abuse of discretion" (R. 37).

In considering the legal sufficiency of the proposed amendment, two questions were presented:

(a) Whether the amendment alleged an act of bankruptcy (as the original allegations did not); and

(b) Whether the involuntary petition in bankruptcy was filed within the statutory time after the commission of the act of bankruptcy alleged in the amendment.

If either question was answered in the negative, the proposed amendment to the involuntary petition was legally insufficient.

The Circuit Court of Appeals answered the second question in the negative.

Petitioner attempted to allege two acts of bankruptcy in its amendment (R. 12-14).

The first was the execution of the waiver of the alleged bankrupt's right of election (R. 13). Whether the execution of the waiver was a fraudulent transfer was contested seriously in the courts below. However, the Circuit Court of Appeals assumed (without deciding) that the waiver was a transfer which amounted

to an act of bankruptcy (R. 34). Petitioner cannot claim to be aggrieved by such a ruling, and certainly the decision of the Circuit Court of Appeals on that point poses no basis for the issuance of a writ of certiorari.

As the second act of bankruptcy, petitioner characterized the conduct of the alleged bankrupt as constituting a "concealment" of her property (R. 14). The facts alleged, however, negative and completely dispel the unfounded characterization of a concealment.

The Circuit Court of Appeals fully analyzed the facts alleged in the amendment, and found no concealment. The Court said:

> "It is clear that the execution of the waiver plus the failure of the appellee to inform the appellant that she had executed it until she so testified in supplementary proceedings, together with her failure to keep a copy of the waiver, to keep informed as to who had it and to learn that it had not been recorded are the only facts relied upon to show concealment. We think they fall short of showing a concealment of property within the meaning of Sec. 3 (a) of the Bankruptcy Act either severally or in the aggregate. At most she failed to disclose to the appellant the fact that she had executed the waiver until she was asked about it in supplementary proceedings and then she concealed nothing. The New York Law does not require the filing of such a waiver for record; there is, indeed, no provision for recording it as notice to anybody. There is no allegation that she concealed the fact that her husband died on June 16, 1944, having executed his will in the

preceding month by the terms of which he left her nothing and obviously she could not conceal what the appellant was conclusively presumed to know, viz., that under the law of New York she had the power, exercisable while her husband was living, to waive her right to take against his will.

Sec. 1 (7) of the Act provides that 'conceal', unless such construction be inconsistent with the context 'shall include secrete, falsify and mutilate.'

Property is concealed or permitted to be concealed within the meaning of those terms in the definition of the first act of bankruptcy in Sec. 3 (a) when a person does, or permits to be done, anything with intent to hinder, delay or defraud his creditors which prevents, or tends to prevent the discovery of the property. Proof of concealment, however, requires something more than a mere failure to volunteer information to creditors. *In re Shoesmith,* Cir. 7, 135 Fed. 684" (R. 36-37).

No authorities are cited by petitioner to indicate that the Circuit Court of Appeals should have held to the contrary.

Having answered the first question favorably to the petitioner, by assuming that there had been an act of bankruptcy, the Circuit Court of Appeals answered the second question in the negative:

"* * * the only possible act of bankruptcy alleged in the proposed amendment was a transfer perfected more than four months before the involuntary petition was filed" (R. 37).

This conclusion of the Circuit Court of Appeals was clearly correct, as analysis will show.

The Bankruptcy Act provides, in Section 3 thereof:

> "(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; * * *.
>
> "(b) A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the first * * * act of bankruptcy shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein * * *" (11 U. S. C. A., Section 21).

In the Circuit Court of Appeals, petitioner urged that the execution of the waiver of the right of election did not constitute a perfected transfer on June 13 or 14, 1944, the date of the execution thereof.

This contention, still urged by petitioner (pp. 30-32, brief in support of petition for writ of certiorari), was overruled by the Circuit Court of Appeals in the following language:

> "Whether the time for filing the petition expired four months after the waiver was executed, any question of concealment aside, obviously depends upon when it became fully effective within the meaning of the above quoted part of the statute (Section 3 (b) of the Bankruptcy Act). That depends upon its effect under the New York law.

The power of a husband or wife to waive the right of election to take against the last will of the other spouse arises from Sec. 18 (9) of the New York Decedent Estate Law reading, so far as now pertinent, as follows:

> '9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage.'

The waiver was executed in due form during the lifetime of the alleged bankrupt and her husband. The statute required nothing more to be done to make it effective as of its date. It was beyond recall by agreement with the husband, or otherwise, after his death on June 16, 1944 which was also over five months before the petition in bankruptcy was filed and it is immaterial in this case whether the so-called 'transfer' took place when the waiver was executed or when the husband died. No authority has been called to our attention, and we have found none, which makes anything a condition precedent to the taking effect of such a waiver as a transfer within the bankruptcy act, if it be such a transfer, except compliance, as was here shown, with the provisions of the New York statute. Consequently any transfer by means of the waiver was perfected to the extent that it would ever be perfected more than four months before the involuntary petition was filed" (R. 34-35).

No New York authorities are cited by petitioner contrary to this rule of law, nor does petitioner even claim that the Circuit Court of Appeals rendered a decision in conflict with the decisions of the New York Courts on such a question.

No basis for the granting of a writ of certiorari is, therefore, set forth.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 12, 1946.